(22)

Office - Supreme Court, U. S.
FILED
AUG 23 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 260

RALPH ELLIOTT SPRINKLE, *Petitioner*

v.

MOSE E. DAVIS, *Respondent*

RESPONDENT'S BRIEF

S. H. WILLIAMS and
PHILIP H. HICKSON,
Lynchburg, Va.

LANDON LOWRY, and
DUVAL RADFORD II,
Bedford, Virginia.
Attorneys for Respondent.

INDEX

Subject Index

PAGE

Statement of the Case 1

Law of the Case 5

Summary of Argument 6

Argument 8

1. (a). Petitioner failed to bear burden to justify further review of case 8

1. (b). No writ to review for discussion of specific facts 8

1. (c). Both lower courts concur—No writ to review evidence 11

1. (d). Doctrine of the Last Clear Chance in Virginia 13

2. (a). Judgment not in conflict with local decisions 17

2. (b). Authorities cited by Petitioner not in point 18

3. Charge against Circuit Court of Appeals unfounded 19

TABLE OF CASES

PAGE

Bennett v. *Spencer*, 167 Va. 268, 189 S. E. 169..... 17

Crawford v. *Hite*, 176 Va. 69, 10 S. E. 2d 561..... 13

Fruit Growers Express Co. v. *Hulfish*, 173 Va. 27, 3 S. E. 2d 160..... 18

Gaines v. *Campbell*, 159 Va. 504, 166 S. E. 704..... 11

Gregory v. *Daniel*, 173 Va. 442, 4 S. E. 2d 786..... 17

Johnson v. *Commonwealth*, 142 Va. 639, 128 S. E. 456. 18

Keeler v. *Baumgardner*, 161 Va. 507, 171 S. E. 592... 15

Norfolk So. R. Co. v. *Crocker*, 117 Va. 327, 84 S. E. 681 14

Page v. *Arkansas Nat. Gas Corp.*, 286 U. S. 269, 76 L. ed. 1096, 52 S. Ct. 507..... 12

Parker v. *Norfolk Orange Crush Co.*, 175 Va. 249, 8 S. E. 2d 301..... 17

Perkinson v. *Persons*, 164 Va. 172, 178 S. E. 682..... 16

Texas & N. O. R. Co. v. *Brotherhood Ry. & Steamship Clerks*, 281 U. S. 548, 74 L. ed. 1034, 50 S. Ct. 427 12

U. S. of America v. *Johnson*, 268 U. S. 220, 69 L. ed. 925. 11

Va. Elec. & Power Co. v. *Whitehurst*, 175 Va. 339, 8 S. E. 2d 296..... 17

Va. Elec. & Power Co. v. *Wright*, supra..... 8, 12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 260

RALPH ELLIOTT SPRINKLE, *Petitioner*

v.

MOSE E. DAVIS, *Respondent*

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

The Petition for Certiorari rests upon the single assertion that the evidence offered by the plaintiff in the trial court, respondent here, failed to make out a case against the defendant, petitioner here. (Petition for Certiorari, p. 7, Sec. III). It is contended there are certain contradictions in the testimony of witnesses for plaintiff and thereby this evidence is shown to be false and the judgment is without credible evidence to support it.

The body of the Brief in support of the Petition is given over to a few narrow quotations from part of the testimony of part of the witnesses and a factual or jury argument that such evidence is incredible and insufficient to support the judgment. The argument raises only the tendencies to be drawn from certain testimony and no effort is made to con-

sider whether or not the evidence as a whole was sufficient to carry the case to the jury.

Hoping to clarify the issue this statement of the case is made.

This case has been tried by juries three times in the District Court and each trial resulted in substantial verdict and judgment for the plaintiff. The amount of the judgment is not and has never been made an issue on appeal.

The case has been reviewed three times by the Circuit Court of Appeals (Fourth Circuit).

At the first appeal of the case to the Circuit Court of Appeals the identical question presented here was before that court and was fully argued. The written opinion carefully considered this assignment of error and concluded that the question presented was for the jury. (*Sprinkle* v. *Davis*, 104 F. 2d 487).

At the second review of the case by the Circuit Court of Appeals the question here presented was again argued but that time an additional principle of the law of negligence was asserted in support of this assigned error. Again the Circuit Court of Appeals carefully considered the question in the written opinion and held it to be for the decision of the jury. This second opinion of the appellate court in this case gives an excellent statement of the law of negligence applicable to the case with Virginia citations. (*Sprinkle* v. *Davis*, 111 F. 2d 925).

For other reasons each of the first two judgments in the case were reversed by the Circuit Court of Appeals and the case twice remanded for retrial.

Upon the third trial of the case in the District Court the two decisions of the Circuit Court of Appeals were carefully adhered to and the defendant assigned no error to the trial court's pronouncements of law or manner in which the trial was conducted. Merely refusal of the formal motions for directed verdict and judgment remained for petitioner to assign as error upon his third appeal to the Circuit Court of Appeals. Therefore, for a third time he assigned this same jury question and made his jury argument to the appellate

court. For the third time the Circuit Court of Appeals held the question to be for the jury and the judgment was affirmed. The written opinion stated:

> "This is the third appeal by the defendant in this case. On the two prior appeals he complained of the refusal of the District Court to direct a verdict and of divers other rulings. On account of other rulings the judgment was each time reversed, but on each occasion we held that there was sufficient evidence to go to the jury. The evidence on the third trial leads to the same conclusion and the judgment is, therefore, Affirmed."
> (*Sprinkle* v. *Davis,* Record p. 38, Vol. 2).

Thereafter petitioner presented his Petition for rehearing and the same was denied. (*Sprinkle* v. *Davis,* 117 F. 2d 938).

The sufficiency of the evidence to support the judgment being questioned respondent wishes to point out certain established facts necessary to an understanding of the case. These facts are, in the main, omitted from petitioner's Statement. Under the circumstances leave is asked to refer to the evidence more freely than would otherwise be done.

Proceeding to the place of the accident as petitioner drove, the highway ascends a vertical curve to the left for approximately 800 feet. In the acute angle of the vertical curve, around which petitioner drove his automobile, is a stone retaining wall and cut bank rising to a height of 7½ feet with a large oak tree growing in the angle of the curve. (R. 4-5, Vol. 2).

From the place respondent started across the highway there was a maximum sight clearance, over part of the cut bank, of the head and shoulders of a man and the top of a car for 670 feet beyond which the view of either is entirely obstructed. The fair, unobstructed view offered each party of the other so as to realize the situation was estimated to be 535 feet. (R. 53-54, Vol. 1).

Respondent was employed as a laborer with a force of men working on the highway and who, at the time of the accident, were engaged in collecting tools at the end of the day's work.

Two trucks used by the highway force were parked on the shoulder of the highway to the right of and off the paved surface in the direction petitioner drove. (R. 126, Vol. 1). Respondent walked around the rear of the truck nearest petitioner's approach and stopped on the shoulder of the road to look for traffic before proceeding to cross the highway to get his lunch bucket. While standing there a fellow worker asked that respondent bring his lunch bucket also, to which respondent consented. Then respondent looked toward Lynchburg in the direction from which petitioner later approached and saw no traffic approaching for the safe distance offered to his view. He then looked along the highway in the opposite direction and saw no traffic approaching from that direction. After taking these views of the highway respondent proceeded to walk across the highway at a diagonal course. When he had crossed to the left side or half of the road as petitioner drove, and within a step or less from the south shoulder of the highway, his attention was attracted by the noise of automobile tires skidding on the highway, he glanced to his left and that instant was struck by the automobile driven by petitioner. (R. 157, 134, 96, 60-61, Vol. 1).

Petitioner was driving the automobile at an extremely high rate of speed and skidded a considerable distance upgrade before striking respondent. (R. 22, Vol. 2). The collision knocked respondent higher in the air than the top of the automobile and in a westerly direction a distance estimated at from 40 to 60 feet. (R. 61, 71-72, 135, Vol. 1). The machine finally came to a stop off the left side of the highway as it was proceeding. (R. 97, Vol. 1). Respondent weighed 170 pounds and the impact was against his left leg, inflicting such injuries as resulted in the amputation of the limb. (R. 160, Vol. 1).

There were two straight, unbroken, parallel marks made upon the highway by the skidding or dragging of the wheels of petitioner's automobile which measured a distance of 44 paces, approximated to be 132 feet. (R. 33, 62, Vol. 1). The skid marks began close to the right side or edge of the pavement as petitioner was driving and extended in a straight

diagonal course across the highway and off the left side thereof. (R. 33, 25-26, Vol. 1). The pavement was dry and visibility clear. (R. 23, Vol. 2).

Petitioner had seen the force of men at work along the highway at the place of the accident earlier in the day as he drove to Lynchburg. (R. 33, Vol. 2). Approaching the scene of the accident petitioner testified he saw the tops of the cabs of the trucks as he rounded the stone retaining wall in the curve (a distance of 670 feet) (R. 24, Vol. 2) and saw the men in and about the trucks when he was 300 or more feet from the trucks. (R. 24, Vol. 2). After seeing the trucks and the men along the side of the highway, petitioner testified he did not reduce the speed of his car but accelerated the speed of the machine. (R. 25, Vol. 2). No warning horn was sounded by petitioner.

The evidence is that petitioner was driving at such an excessively high rate of speed as he rounded the curve and approached the scene of the accident, his automobile was out of control and appeared it would go off the road and crash into the trucks parked to the right side thereof (R. 143, Vol. 1). To avert this collision, petitioner turned his machine to the left and it skidded out of control diagonally straight across the road and struck respondent who was then on the south or left side of the road. The right half of the road, as petitioner was traveling, was open and clear for travel. (R. 102, Vol. 1).

Respondent never saw petitioner's approach and had no opportunity to know of his peril and save himself from injury. (R. 157, Vol. 1; R. 29, Vol. 2).

LAW OF THE CASE

This case presents no disputed question of law.

The construction of no statute—Federal or State—is involved in this case. It is not a case of initial application of any principle of law in local federal courts.

The case is of no general interest and of no important State or local interest.

At the trial of the case the Court's charge to the jury embodied every request of the petitioner (defendant below) for instructions of law. Every theory of his defense was fully covered to his satisfaction as is confirmed by his favorable quotation from the trial court's charge to the jury at pages 53 and 54 of his Brief in support of Petition for Certiorari. Nor did petitioner take exception to the court's charge to the jury upon respondent's theory of the case.

As petitioner points out there were conflicts in the evidence. This Petition for Writ of Certiorari assigns as error only the judgment of the Circuit Court of Appeals in affirming the trial court's action overruling petitioner's motions for directed verdict and judgment. The Petition thereby presents the single question of whether or not there was substantial evidence in support of the judgment. Both lower courts decided there was and that all questions upon the evidence were properly for the jury.

The only law to be considered is that governing the weight to be given a jury's verdict confirmed by the judgment of court and whether under the error assigned a different judgment might be rendered in an appellate court.

SUMMARY OF ARGUMENT

Petitioner states three reasons upon which he relies for allowance of writ. The argument will show there is no merit in the reasons advanced for granting the writ:

1. (a). Petitioner has not borne the burden upon him to establish there is no conflict in the evidence of contributory negligence and no direct and reasonable inference to be drawn from the evidence as a whole sustaining the judgment.

Va. Elec. & Power Co. v. *Wright*, 170 Va. 442, 196 S. E. 580.

(b). The judgment is abundantly supported by credible evidence. Certiorari should not be granted to review the evidence for a discussion of specific facts.

U. S. of America v. *Johnson*, 268 U. S. 220, 69 L. ed. 925.

(c). Both courts below having found the facts in favor of respondent, certiorari should not be granted to review the evidence.

Texas & N. O. R. Co. v. *Brotherhood Ry. & Steamship Clerks*, 281 U. S. 548, 74 L. ed. 1034, 50 S. Ct. 427; *Page* v. *Arkansas Nat. Gas Corp.*, 286 U. S. 269, 76 L. ed. 1096, 52 S. Ct. 507; *Gaines* v. *Campbell*, 159 Va. 504, 166 S. E. 704; *Crawford* v. *Hite*, 176 Va. 69, 10 S. E. 2d 561; *Va. Elec. & Power Co.* v. *Wright*, supra.

(d). Under the *doctrine of the last clear chance*, applied in this case, no other judgment could be properly entered even though petitioner's erroneous allegations and conclusions of fact be considered as correct.

Norfolk So. Ry. Co. v. *Crocker*, 117 Va. 327, 84 S. E. 681; *Keeler* v. *Baumgardner*, 161 Va. 507, 171 S. E. 592; *Perkinson* v. *Persons*, 164 Va. 172, 178 S. E. 682; *Parker* v. *Norfolk Orange Crush Co.*, 175 Va. 249, 8 S. E. 2d 301; *Bennett* v. *Spencer*, 167 Va. 268, 189 S. E. 169; *Gregory* v. *Daniel*, 173 Va. 442, 4 S. E. 2d 786; *Va. Elec. & Power Co.* v. *Whitehurst*, 175 Va. 339, 8 S. E. 2d 296.

2. (a). Opinions of the Circuit Court of Appeals in this case are misconstrued and no question of local law has been decided in conflict with the decisions of the Supreme Court of Appeals of Virginia.

Johnson v. *Commonwealth*, 142 Va. 639, 128 S. E. 456; *Fruit Growers Express Co.* v. *Hulfish*, 173 Va. 27, 3 S. E. 2d 160.

(b). Petitioner cites authorities not bearing on the question presented.

3. The serious charge against the Circuit Court of Appeals that it has not given deliberate consideration and rendered a studied opinion upon the merits of the

case raised by this assignment of error is absolutely unfounded and refuted by the Record.

ARGUMENT

1. (a). On this appeal all conflicts in the evidence should be resolved in favor of respondent. An appellant asking for a directed verdict and judgment must do more than show a conflict in the evidence.

> "Generally at a trial by jury, the burden rests upon the defendant to show such negligence by a preponderance of the evidence, but here on appeal when the defendant asked us to hold, as a matter of law, that the plaintiff was guilty of contributory negligence, he must do more. He must show that there is no conflict in the evidence of contributory negligence, and that there is no direct and reasonable inference to be drawn from the evidence as a whole sustaining the conclusion that the plaintiff was free of contributory negligence."
>
> *Va. & Elec. Power Co.* v. *Wright*, 170 Va. 442, 448-449, 196 S. E. 580, 582.

The evidence of respondent and his witnesses was that there was no act of negligence on his part which contributed to the injury. He was in a place of reasonable safety on the opposite side of the highway from the line of petitioner's lawful travel at the time he was struck. Petitioner does not consider any of the evidence conflicting with his theory of contributory negligence or the whole of the evidence to see if an inference can be drawn sustaining the jury's verdict that respondent was not guilty of contributory negligence. Petitioner's Brief does not carry the burden upon him and cites no authority in support of his argument on this point.

1. (b). The whole of petitioner's argument is built around the assertion that there is no credible evidence to support the judgment. That there is affirmative evidence in abundance petitioner does not deny. The con-

tention is to the credibility of the evidence. Hoping to reflect upon the body of the evidence, without commenting upon it, a few excerpts from the testimony are taken and given distorted tendencies. The evidence in this case has too often been carefully considered by too many reasonable and fair-minded men to be the subject of such unwarranted criticism. A sufficient answer to the argument is to recount those who have weighed the evidence. Three trial juries heard the evidence and fixed their respective verdicts for the respondent in the sums of $10,000.00, $8,000.00 and $8,500.00. At each of the first two trials in the district court the same judge presided. At the third trial in the district court a different judge presided. After the first review of the case by the circuit court of appeals one of its judges retired and the successor judge served on the court at each of the two successive appeals. Thus, the evidence in this case has been considered by thirty-six jurors, two district judges, and four judges of the circuit court of appeals. All forty-two of these men decided in each instance that the respondent's case was meritorious and proven by the evidence. For the petitioner to assert that the many who considered the evidence accepted the incredulous and that he, with his prejudice and interest, alone correctly construes the evidence is a preposterous assertion and of no appeal. This same preposterous attitude of the petitioner is reflected in his testimony in which he readily admits the grossest kind of negligence and makes other statements totally unsupported by any other witness.

It should be noted that respondent testified before walking onto the paved portion of the highway he looked for the safe distance open to his view in the direction from which petitioner later approached and saw no automobile. After taking that view he looked in the opposite direction and saw no approaching traffic. He then started walking across the pavement in a diagonal course toward his lunch bucket which was in the yard of private

property. Whether the time consumed by respondent in taking a view in the opposite direction from which petitioner approached and before starting across the highway was a reasonable delay after he had looked in the direction of petitioner's approach was a question for the jury. It was also for the jury to determine upon the evidence at what speed and manner the petitioner was driving at the time of the collision. The evidence of excessive speed at which petitioner was driving his car at the time of the accident is worthy of notice for it must have figured largely in the juries' deliberations and is, even considered alone, substantial support for the judgment. Some descriptions of the speed of the machine by the witnesses are that it was being driven as fast as it could go and more recklessly than any car that the experienced foreman of the men had ever seen a car approach or run through a gang of men (R. 98, Vol. 1); that on hearing the skid noise witnesses quickly looked but the collision had already occurred and respondent was seen high off the ground (R. 71, 78, 150, Vol. 1); "It all seemed like it just happened at once" (R. 135, 157, Vol. 1); "all in the twinkling of the eye. It all just happened at once" (R. 64, Vol. 1); "a car came up like a rush of wind" * * * "it just flew right into the men' * * * 'flew into that man." * * * "The car never sounded a horn or anything. It just came right up on them men without a moment's warning." (R. 143, 146, 147, Vol. 1). Petitioner's own witness stated he saw respondent half way across the road when petitioner's car was 200 feet off and yelled a warning (R. 20-21, Vol. 2). The foreman on the job stated that on hearing the high motor speed of the approaching car he looked to see it at approximately 350 feet off and yelled a warning to all the men in the group (R. 95, 97-98, 105, Vol. 1).

It is an inescapable fact that petitioner must have been driving at the most reckless speed to cause men accustomed to working on public highways and passing traffic to shout a warning to their companions instantly upon

seeing an approaching automobile 350 and 200 feet distant. Nor can the physical fact that the machine skidded 132 feet upgrade, on dry asphaltic-macadam pavement, near the middle of which skid distance it struck a 170 pound man knocking him high in the air at 40 to 60 feet distance, be explained except by the fact that the machine was traveling at a terrific rate of speed when the collision occurred. Petitioner's disregard of this and other material evidence leaves his contention hollow.

Writ of Certiorari should not be granted in this case for only a review of the evidence and discussion of specific facts would result.

U. S. of America v. *Johnson*, 268 U. S. 220, 69 L. ed. 925.

1. (c). The Circuit Court of Appeals reviewed the evidence in this case on each of the three appeals and determined it sufficient to support the verdict and judgment. A review of the evidence to determine there was substantial support for the verdict and judgment is all that the petitioner could have expected had this case been before the Virginia Supreme Court of Appeals.

"When we come to consider facts which are the subject of sharp dispute and have ascertained that a jury's verdict and a court's judgment find in the evidence substantial support, our task is at an end. It would be futile to discuss conflicts in detail when at the end we would have to admit that the verdict and judgment are controlling. It is only necessary to know that there is sufficient evidence to support the verdict."

Gaines v. *Campbell*, 159 Va. 504, 515, 166 S. E. 704, 708.

Even had respondent not proven his case by the overwhelming weight of the evidence, but had left the proof of his case

in doubt, the rule would nevertheless have been the same on a review before the Virginia Supreme Court of Appeals.

> "Close and doubtful negligence cases frequently come to this court. If we review a judgment which approves a verdict in one of those cases and there appears to be nothing wrong with the verdict other than that it is doubtful whether it is sustained by the evidence, then it is our duty to affirm the judgment."
>
> *Va. Elec. & Power Co.* v. *Wright*, 170 Va. 442, 447, 196 S. E. 580, 582.

The same rule pertains before this Court.

> "Many and complicated questions of fact are involved and were argued here, but, as they have been found in favor of the respondent by both courts below, we do not review them."
>
> *Page* v. *Arkansas Nat. Gas Corp.*, 286 U. S. 269, 271, 52 S. Ct. 507, 508, 76 L. ed. 1096, 1098.
>
> "Under the well-established rule, this court accepts the findings in which two courts concur, unless clear error is shown." * * *
>
> "The most that can be said in favor of the petitioners on the questions of fact is that the evidence permits conflicting inferences, and this is not enough."
>
> *Texas & N. O. R. Co.* v. *Brotherhood of Ry. & Steamship Clerks*, 281 U. S. 548, 558, 559-560, 50 S. Ct. 427, 429, 430, 74 L. ed. 1034, 1040.

The established rule of this Court to accept the findings of the lower courts is particularly applicable in this case because of the different views which the jury may have taken of the evidence. The jury could have decided that respondent was guilty of no negligence or that any negligence on his part was only a remote cause and that the injuries suffered resulted solely from the proximate negligence of the petitioner. It is also true, as is hereinafter noticed, that even if the jury decided

that respondent was contributorily or concurrently negligent, yet, under the law of the case, the jury might have properly found for respondent. Not knowing what view of the case was taken by the jury we do not know on what part of the evidence the verdict was based. Under these circumstances, it would avail nothing to review the evidence since, in the final analysis, it must be admitted there was substantial evidence on which the verdict could have been found. Quite recently the Virginia Supreme Court of Appeals again commented in its opinion upon a like situation, *Crawford* v. *Hite*, 176 Va. 69, 75-76, 10 S. E. 2d 561, 563:

> "It is argued that in walking on the hard-surfaced portion of the road instead of on the shoulder, Mrs. Cook was guilty of contributory negligence which bars a recovery here. This contention is not sound. Even if it be considered that she was guilty of negligence in walking on the pavement, this does not necessarily preclude recovery because there was ample evidence to support the finding of the jury that the driver of the truck, by the exercise of ordinary care, could or should have seen Mrs. Cook in a position of danger and could have avoided running into her. In such a situation the jury had the right to find that the negligence of the deceased was the remote cause and that of the driver was the sole proximate cause of the collision."

1. (d). Respondent requested that the case be submitted to the jury under the theory that the injuries resulted from no negligence on his part and also upon the doctrine of the *last clear chance*. This was done without objection by petitioner. It is not now contended there was insufficient evidence to warrant submission of the case to the jury under the doctrine of the last clear chance. This principle of law as applied in Virginia is defined by the highest court of the State to be:

> "The rule (*i.e. doctrine of the last clear chance*) in question which has frequently been applied to cases in which the plaintiff's negligence has continued to the very

> moment of the injury, is a qualification of the general rule that contributory negligence bars a recovery, and the principle is that, although the plaintiff has been negligent in exposing himself to peril, and although his negligence may have continued until the accident happened, he may nevertheless recover if the defendant, after knowing of his danger and having reason to suppose that he may not save himself, could have avoided the injury by the exercise of ordinary care, and failed to do so. This principle has been adopted by practically all the courts of last resort, both in England and in this country, and has been repeatedly endorsed by this court." (Italicized insert ours).
>
> *Norfolk So. R. Co.* v. *Crocker,* 117 Va. 327, 331, 84 S. E. 681, 683-684.

Petitioner argues that the evidence of respondent and his witnesses is that immediately he had taken a view for automobiles traveling in the direction of petitioner he started across the road and of necessity he must have seen the machine being driven by petitioner. Under these circumstances petitioner asserts that respondent was contributorily negligent and that his testimony of not seeing the approaching automobile is not credible. The evidence will not support the premise but assuming that respondent took no view for automobiles traveling on the highway or that he was negligent in attempting to cross the highway when the machine driven by petitioner was close on him, yet, neither of these circumstances would necessarily preclude his recovery. If petitioner had the last clear chance and failed to perform the duty upon him to save respondent, then the jury had the right to find for respondent.

The opinion of the Supreme Court of Virginia in a case presenting a similar state of facts points out the way in which the jury may apply the Doctrine of the Last Clear Chance under the evidence.

> "The jury could have reasonably found from the evidence that Mrs. Keeler (*defendant*) was guilty of no actionable negligence or that if she were, then the plaintiff was guilty of either contributory or concurring negligence which, of course, would have barred a recovery. On the other hand, they could just as reasonably have found that Mrs. Keeler was guilty of primary negligence, and that the plaintiff was guilty of no negligence which proximately and efficiently contributed to his injury; or they could have found that while the plaintiff was in a state of negligence in crossing the street diagonally between intersections without exercising proper care for his safety, Mrs. Keeler ought to have seen him in his peril, in the exercise of ordinary care, and avoided striking him with her car either by stopping it or by diverting its course."
>
> *Keeler* v. *Baumgardner*, 161 Va. 507, 513-514, 171 S. E. 592, 594.

In the decision of another closely analogous case the Supreme Court of Virginia made the following comments upon the doctrine of the last clear chance as applied to the evidence:

> "The application of the doctrine of the last clear chance was one theory upon which the plaintiff based his right to recover. The evidence justified the court in submitting an instruction on that doctrine. The testimony discloses that Perkinson (*defendant*) could have seen Mrs. Persons (*plaintiff*) standing in the street when

she was still 150 feet away. The jury had the right to conclude that if he had seen her when he should have seen her he could have avoided running over her by using his brakes which were in good condition, by reducing his speed, which he did not do until it was too late, or by seasonably turning back to his right side of the street after passing Mr. Foster's car. The jury could have reasonably concluded that he had a clear opportunity, in the exercise of ordinary care, to have taken one or all of those precautions, and if he had, Mrs. Persons would have been saved even though she were in a state of negligence in standing in, and crossing the street. Whether Perkinson should have discovered her peril sooner than he did, and whether he had a clear chance to save her in the exercise of ordinary care were matters for the jury and by their verdict these things have been decided adversely to the plaintiff in error. Such a finding has substantial evidence to support it."

Perkinson v. *Persons*, 164 Va. 172, 176-177, 178 S. E. 682, 684.

At the risk of repetition we would quote from the opinion of a third recent Virginia case holding that under the doctrine of the last clear chance the jury may find for the plaintiff even though he was contributorily or concurrently negligent.

"We will assume, for the purpose of the discussion of the question now under consideration, that decedent was in a state of negligence while rolling his bicycle on the right side of the traveled portion of the highway. Still it was the duty of the operator of defendant's truck to keep a lookout and to use ordinary care and caution commensurate with obvious danger to avoid striking and injuring other users of the highway." * * *

"Careful examination of all the evidence convinces us that it was sufficient to carry the case to the jury on the doctrine of the last clear chance. The evidence presents a factual situation where the jury could, with reason, have found, as they evidently did find, that if the driver

of the truck, who did not see decedent at all before the impact, had been keeping a proper lookout he could have seen decedent rolling a lighted bicycle up a steep incline in ample time to have stopped his truck if necessary to avoid inflicting injuries upon him."

Parker v. *Norfolk Orange Crush Co.*, 175 Va. 249, 252, 254-255, 8 S. E. 2d 301, 302-303.

Therefore, if petitioner's contention of contributory negligence be conceded, nevertheless, under this different theory of the case, upon which it was submitted to the jury, the verdict might have been found for respondent. The burden upon petitioner under the error assigned is to show that under no view of the testimony could the jury reasonably find the verdict or the court sustain that verdict by judgment. This burden petitioner has sought to escape.

No other judgment could be found in this case for petitioner admitted facts sufficient to establish that he could have averted the accident by the exercise of any reasonable or even slight degree of care. He admitted that he saw the large force of men and trucks along the side of the highway when at a safe distance of 300 feet or more; that he did not then or at any time before a collision was imminent slow the speed of his machine but, on the contrary, accelerated the speed of his machine; that the right half of the road on which he was required to drive was open to travel, and that he struck respondent on the left side of the road. Under these facts petitioner had the last clear chance to avert the injury to respondent and only a verdict and judgment for respondent could properly be entered.

Other recent cases applying this principle of law are:

Bennett v. *Spencer*, 167 Va. 268, 189 S. E. 169; *Gregory* v. *Daniel*, 173 Va. 442; *Va. Elec. & Power Co.* v. *Whitehurst*, 175 Va. 339, 8 S. E. 2d 296.

2. (a). It is argued that a question of local law has been decided by the Circuit Court of Appeals contrary to the decisions of the highest State court. This argument evolves out

of petitioner's construction of a sentence of the last opinion rendered in this case by the Circuit Court of Appeals. The expression quoted at page 46 of petitioner's Brief, follows:

> "It is too well settled to justify discussion that on motion for directed verdict by defendant the evidence must be considered in the light most favorable to plaintiff and that the court will not pass upon the credibility of witnesses."

This expression he construes as a refusal by the court to review the evidence and search out contradictions which, he states, destroys the credibility of the witnesses and their testimony.

We need not repeat what has been said of the credible nature of the testimony. Actually this complaint is that jury and judge repudiated defendant's testimony and have refused to draw from the plain statements of simple men inferences not in the intendment of their expression. That the jury is the sole judge of the credibility of witnesses and the weight to be given their testimony really requires no support.

Johnson v. *Commonwealth*, 142 Va. 639, 128 S. E. 456; *Fruit Growers Express Co.* v. *Hulfish*, 173 Va. 27, 3 S. E. 2d, 160.

Cases cited by petitioner in support of this "reason" for allowance of writ are beside the point. The argument only contends for a desired conclusion to be drawn from selected excerpts of the evidence.

The Circuit Court of Appeals did not refuse to review the evidence but actually did review it to ascertain there was substantial support for the judgment. This will appear from each of the three opinions in this case (hereinbefore cited).

2. (b). Petitioner argues that the failure of respondent to call his brother as a witness raises a presumption that his testimony would not have supported respondent's case. Furthering this argument, it is alleged that respondent's brother

was necessarily an eye witness of the accident. (Brief, p. 53). There is no support for this assumption in the Record. The Record will disclose that a brother of respondent was employed in the highway force and rode in a truck with respondent to the scene of the accident. Whether or not he saw or was in a position to see the collision is not disclosed. (R. 101, Vol. 1). Important it is that nothing in the Record indicates respondent's brother had any peculiar knowledge or that his testimony would have done more than corroborate the many disinterested and unbiased witnesses who testified on behalf of respondent. The distinction between the authorities cited and the case at bar is all too apparent. This argument was made to the jury at the last trial of the case and at petitioner's request the jury was properly charged upon the law governing the situation.

3. To support this unworthy Petition the shocking assertion is made that the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an extension of this Court's power of supervision (Petition for Writ of Certiorari, p. 8, IV. *"The Reasons Relied On for Allowance of the Writ."*) As basis for this charge petitioner complains he has not received the studied opinion of the Circuit Court of Appeals upon the assignment of error before this Court. (*Brief in Support of Petition for Writ of Certiorari, p.* 45). This assertion, like each of the other *reasons* relied on for allowance of the Writ, is absolutely unfounded. The written opinions of the Circuit Court of Appeals best speak for that Court and will show that three times the error relied on here was assigned when the case was before that Court. In each instance the court heard the argument and carefully reviewed the evidence to ascertain that there was substantial support for the juries' verdicts and the judgments of the trial court. Two studied opinions on this feature of the case were written and at the third review of the case petitioner added nothing to his former argument requiring further enlargement of the opinion of the court.

Petitioner has received a fair trial of his case and sympathetic reviews of the case by the Circuit Court of Appeals. The assignment of error is without merit and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

S. H. WILLIAMS and
PHILIP H. HICKSON,
Lynchburg, Virginia.

LANDON LOWRY and
DUVAL RADFORD II,
Bedford, Virginia.
Attorneys for Respondent.